

1  
2  
3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

5 \* \* \*

6 JERMAINE HAMPTON,

7 Plaintiff,

8 v.

9 STATE OF NEVADA, ET AL.,

10 Defendants.  
11

Case No. 2:20-cv-00578-APG-DJA

**REPORT AND RECOMMENDATION**

12 This matter is before the Court on Plaintiff's Motion to Amend the Complaint (ECF No.  
13 38), filed on September 21, 2020. Defendants filed a Response (ECF No. 39) on October 5, 2020.  
14 To date, no reply has been filed by Plaintiff.

15 The Court previously granted Plaintiff's Motion to Amend on September 10, 2020 such  
16 that the Second Amended Complaint currently serves as the operative complaint. (ECF No. 35).  
17 Plaintiff again requests to amend with the Third Amended Complaint to add allegations only  
18 against District Attorneys Stephanie Getler and Sarah Overly in response to a pending motion to  
19 dismiss (ECF No. 25) for the prior complaint that raises an immunity argument. Defendants  
20 oppose the amendment as they claim it is futile and they also file a new motion to dismiss (ECF  
21 No. 40) as to the Second Amended Complaint.

22 Rule 15(a)(2) of the Federal Rules of Civil Procedure, regarding the amendment of  
23 pleadings, directs that "[t]he court should freely give leave when justice so requires." The Ninth  
24 Circuit Court of Appeals has repeatedly cautioned courts in this circuit to "liberally allow a party  
25 to amend its pleading." *Sonoma Cnty. Ass'n of Ret. Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117  
26 (9th Cir. 2013). "Courts may decline to grant leave to amend only if there is strong evidence of  
27 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure  
28 deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue

1 of allowance of the amendment, or futility of amendment, etc.” *Id.* at 1117 (*quoting Foman v.*  
2 *Davis*, 371 U.S. 178, 182 (1962)).

3 Here, as with his prior request, Plaintiff filed the instant Motion prior to the expiration of  
4 the deadline to amend pleadings or add parties, September 25, 2020. (ECF No. 23). However,  
5 Plaintiff filed his Motion to Amend more than 21 days after Defendant filed the first Motion to  
6 Dismiss (ECF No. 25). “A party may amend its pleading once as a matter of course within: (a) 21  
7 days after serving it, or (b) . . . 21 days after service of a motion under Rule 12(b) . . .”  
8 Fed.R.Civ.P. 15(a)(1). In all other cases, “a party may amend its pleading only with the opposing  
9 party’s written consent or the court’s leave. The court should freely give leave when justice so  
10 requires.” *Id.* at (a)(2).

11 Defendants argue that the Court should deny the request to amend because it is futile as  
12 they have qualified immunity and the new allegations do not affect that status. The Court notes  
13 that their argument is set forth in the new Motion to Dismiss (ECF No. 40), which the District  
14 Judge has yet to decide. At this point, and with a careful screening of the new allegations  
15 regarding the District Attorneys in the proposed Third Amended Complaint, the Court agrees  
16 with Defendants that the amendment is futile and should not be permitted. The Court complied  
17 with the liberal amendment policy by permitting Plaintiff’s request for leave to proceed with the  
18 Second Amended Complaint. It does not find that same liberal amendment policy should be  
19 applied as to the proposed Third Amendment Complaint because the additional allegations do not  
20 change the viability of the alleged claims against the Defendants Overly and Getter. The Court is  
21 not persuaded that Plaintiff’s Fourteenth Amendment claims against those two District Attorneys  
22 who acted in their official capacity will survive dismissal.

### 23 RECOMMENDATION

24 IT IS THEREFORE RECOMMENDED that Plaintiff’s Motion to Amend the Complaint  
25 (ECF No. 38) be **denied**.

### 26 NOTICE

27 Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation must be  
28 in writing and filed with the Clerk of the Court within (14) days after service of this Notice. The

1 Supreme Court has held that the courts of appeal may determine that an appeal has been waived  
2 due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142  
3 (1985), *reh'g denied*, 474 U.S. 1111 (1986). The Ninth Circuit has also held that (1) failure to file  
4 objections within the specified time and (2) failure to properly address and brief the objectionable  
5 issues waives the right to appeal the District Court's order and/or appeal factual issues from the  
6 order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi*  
7 *Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

8  
9 DATED: October 15, 2020.



---

DANIEL J. ALBREGTS  
UNITED STATES MAGISTRATE JUDGE